# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 669 Insurance Claims
**SPONSOR(S):** Insurance & Banking Subcommittee; Tobia
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1064

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|---|---|---|
| 1) Insurance & Banking Subcommittee | 10 Y, 3 N, As CS | Haston | Cooper |
| 2) Civil Justice Subcommittee | | | |
| 3) Regulatory Affairs Committee | | | |

## SUMMARY ANALYSIS

Generally, an assignment of benefits allows a third party to collect insurance proceeds owed to the policyholder directly from the insurance company. Consequently, the proceeds are not paid to the policyholder. Assignments of benefits are commonly used in health insurance and personal injury protection insurance. In health insurance, a policyholder typically assigns his or her benefits for a covered medical service to the health care provider. Thus, the treating physician gets paid directly from the insurer.

Assignment of benefits are becoming more common in property insurance claims, particularly in water damage claims where a homeowner assigns his or her benefits on their property insurance policy to a contractor or water remediation company who repairs the damaged property (hereinafter collectively referred to as a "vendor"). With losses caused by water damage, such as leaky pipes, the homeowner is often in an emergency position where he or she must mitigate the damage before further damage is caused. This often involves calling a water restoration company to the home to immediately mitigate and prevent further flooding.

Current law provides that an insurance policy may be assignable, or not assignable, as provided by its terms. The law allows for an insurance policy to prohibit a pre-loss assignment of benefit. However, it is unclear whether an insurance policy may include language prohibiting the assignment of post-loss benefits.

- This bill clarifies that a property insurance policy may prohibit the assignment of post-loss benefits except in certain limited circumstances.

Current law requires a person seeking to enforce a property insurance policy to have an insurable interest in the property at the time of the loss. An insurable interest means an actual interest in the safety or preservation of the insured property. There is current debate regarding whether an assignee of post-loss property insurance benefits has an insurable interest in covered property such that they could enforce the contract of insurance.

- This bill clarifies that insurable interest does not survive assignment, except when assigned to a subsequent purchaser of covered property.

Current law requires public adjusters to be qualified and licensed by the Department of Financial Services. Contractors and subcontractors are prohibited from adjusting a claim on behalf of an insured unless licensed and compliant as a public adjuster. However, contractors may discuss or explain a bid for construction or repair of the insured property if doing so is part of the usual and customary fees applicable to the work being performed as provided by contract. Current law also prohibits public adjusters from participating, directly or indirectly, in the repair or restoration of property that is the subject of a claim adjusted by the licensee, or engaging in any other activities that could reasonably be construed as a conflict of interest.

- This bill clarifies that any assignment or agreement that purports to assign to a contractor or subcontractor the authority to adjust, negotiate, or settle any portion of a claim is void.

Current law prescribes various timeframes for an insurer's duties regarding property insurance claims.

- This bill shortens the timeframes associated with property insurance claims, requiring insurers to fulfill certain duties related to property insurance claims quicker.

The bill does not have a fiscal impact on the state or on local governments. It may have a positive but indeterminate fiscal impact on the private sector.

The bill provides an effective date of July 1, 2015.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

**Background on Issue**

Generally, an assignment of benefits (AOB) allows a third party to collect insurance proceeds owed to the policyholder directly from the insurance company. Consequently, the proceeds are not paid to the policyholder. AOBs are commonly used in health insurance and personal injury protection insurance. In health insurance, a policyholder typically assigns his or her benefits for a covered medical service to the health care provider. Thus, the treating physician gets paid directly from the insurer.

AOBs are becoming more common in property insurance claims, particularly in water damage claims where a homeowner assigns his or her benefits on their property insurance policy to a contractor or water remediation company who repairs the damaged property (hereinafter collectively referred to as a "vendor").

With losses caused by water damage, such as leaky pipes, the homeowner is often in an emergency position where he or she must mitigate the damage before further damage is caused. This often involves calling a water restoration company to the home to immediately mitigate and prevent further flooding. Some insurers assert AOBs to a vendor in a water damage claim can be problematic because if the vendor submits an invoice to the insurer that is more than what the insurer estimates it should cost to remediate and dry-out the policyholder's residence, the insurer must investigate the claim, determine why the invoice is higher than estimated by the insurer, and identify whether all the work indicated in the invoice was performed. Insurance policies typically provide authority for the insurer to take certain actions to investigate claims, such as requiring policyholders to file proofs of loss, to produce records, and submit to examinations under oath. However, vendors obtaining an AOB for the claim many times allege they do not have to comply the insurer's claims investigation authorized under the insurance policy because they agreed only to an assignment of the insurance benefits and did not agree to assume any of the duties under the insurance policy.[1]

In testimony before the Insurance & Banking Subcommittee, Citizens Property Insurance Company ("Citizens") reported that 70% of the property insurance claims in 2014 were caused by water damage, 56% of which caused by non-weather water damage.[2] Such water damage claims appear to be highest in the counties of Miami-Dade, Broward, and Palm Beach (collectively referred to as the "Tri-County").[3] Citizens reported that of the volume of water damage claims from 2014, 72% were from the Tri-County.[4] Further, the results of a Citizens 2013 litigation study revealed that 75% of all 2013 litigation involved water claims.[5]

**Assignability of Insurance Policies**

Background on Assignability of Insurance Policies

Currently, Florida law provides that "a policy may be assignable, or not assignable, as provided by its terms."[6] An AOB can occur in two circumstances: pre-loss AOBs and post-loss AOBs. A pre-loss AOB occurs before a policyholder experiences a loss, and a post-loss AOB occurs after a policyholder experiences a loss. Florida law allows an insurance company to include language in the policy prohibiting pre-loss AOBs.[7] However, it is less clear whether Florida law allows an insurance company

[1] Florida House of Representatives Regulatory Affairs Committee, Staff Analysis of 2013 CS/CS/HB 909, p. 2 (Apr. 18, 2013).
[2] Citizens Property Insurance Corporation, Citizens Presentation on Assignment of Benefits (Feb. 9, 2015), on file with Insurance & Banking Subcommittee.
[3] Id.
[4] Id.
[5] Id.
[6] s. 627.422, F.S.
[7] Id.

to include language in the policy prohibiting post-loss AOBs; this question is currently on appeal to the Florida First District Court of Appeal.[8]

Florida case law provides that "a provision in a policy of insurance which prohibits assignment thereof except with the consent of the insurer does not apply to prevent assignment of the claim or interest in the insurance money then due, after loss."[9] In other words, an insurer can include a provision in a property insurance policy that prohibits a policyholder from assigning his or her policy to a third party. However, such a prohibition does not prohibit the policyholder from assigning his or her rights under the policy once a claim arises.[10] The purpose of a no-assignment provision in a policy is to protect an insurer against unbargained-for risks.[11] One reason a post-loss assignment is valid despite a provision prohibiting assignment without consent of the insurer is that once a loss occurs, the financial exposure of the insurance company does not change. If a post-loss AOB is made, the assignee cannot assert new rights of his or her own that did not belong to the assignor.

The current debate regarding the assignability of a property insurance policy is whether an insurer can include language in the policy prohibiting the assignment of post-loss benefits.[12]

Effect of the Bill on Assignability of Insurance Policies

This bill amends s. 627.422, F.S., allowing a property insurance policy to prohibit the post-loss assignment of rights, benefits, causes of action, or other contractual rights under the policy, except in limited circumstances. The bill provides that the insured in a property insurance policy nonetheless has the right to make the following assignments:

- The insured may assign the benefit of payment not to exceed $3,000 to a vendor providing services or materials to mitigate or repair damage directly arising from a covered loss. However, such assignment is limited solely to the ability to be named as a copayee for the benefit of payment for the reasonable value of services rendered and materials provided to mitigate or repair such damage. The insured may not assign the right to enforce payment of the post-loss benefits contained in the policy. In other words, even if the insured does make an assignment to a vendor, the vendor cannot itself enforce payment under the policy.
- The insured may make an assignment for the limited purposes of compensating a public adjuster for services as authorized by s. 626.854(11), F.S. Such an assignment is solely for the purposes of compensating the public adjuster.
- The insured may make an assignment for payment of an attorney representing the insured. Such assignment only contemplates that the benefits are paid to the attorney representing the insured, and that the insured will disperse the funds to repair the property at the direction of the insured.

The bill also adds language clarifying that any post-loss assignment in contravention of the statute will be rendered void.

**Insurable Interest**

Background on Insurable Interest

[8] Security First Ins. Co. v. Fla. Office of Ins. Reg., No. 1D14-1864 (Fla. 1st DCA) (notice of appeal filed Apr. 25, 2014).
[9] Gisela Invs. ,N.V. v. Liberty Mut. Ins. Co., 452 So. 2d 1056 (Fla. 3d DCA 1984); see also West Florida Grocery Co. v. Teutonia Fire Ins. Co., 77 So. 209, 224 (Fla. 1917) ("[I]t is a well-settled rule that the provision in a policy relative to the consent of the insurer to the transfer of an interest does not apply to an assignment after loss."); Better Construction, Inc. v. National Union Fire Ins. Co., 651 So. 2d 141, 142 ("[A] provision against assignment of an insurance policy does not bar an insured's assignment of an after-loss claim."); Highlands Ins. Co. v. Kravecas, 719 So. 2d 320, 321 (Fla. 3d DCA 1998).
[10] See Florida House of Representatives Regulatory Affairs Committee, Staff Analysis of 2013 CS/CS/HB 909, p. 2 (Apr. 18, 2013).
[11] Lexington Ins. Co. v. Simkins Industries, Inc., 704 So. 2d 1384, 1386 (Fla. 1998).
[12] See Security First Ins. Co. v. Fla. Office of Ins. Reg., No. 1D14-1864 (Fla. 1st DCA) (notice of appeal filed Apr. 25, 2014).

To enforce a property insurance contract, a person must have an insurable interest in the insured property. Specifically, Florida law provides: "No contract of insurance of property or of any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured as at the time of the loss."[13] Florida law defines "insurable interest" in the property insurance context as "any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage from impairment."[14] "The measure of insurable interest in property is the extent to which the insured might be damnified by loss, injury, or impairment thereof."[15]

The test for the existence of an insurable interest in the insured property is whether, at the time of the loss, one "benefits from [the property's] existence and would suffer loss from its damage or destruction."[16]

Current law provides that a contract of property insurance cannot be enforced in court without an insurable interest.[17] There is currently debate over whether the vendor, by virtue of an AOB, has an insurable interest in the insured property such that it can enforce the contract of insurance following a loss.[18]

Effect of the Bill on Insurable Interest

This bill amends s. 627.405, F.S., clarifying that an insurable interest does not survive an assignment, except to a subsequent purchaser of the property who acquires an insurable interest following a loss. Thus, if an insurer allowed a policyholder to assign the post-loss benefit of payment to a person or entity providing services or materials to mitigate or repair a loss, such assignee would not itself be able to bring suit to enforce payment.

If the insured property is sold, the bill provides that a subsequent purchaser can acquire an insurable interest following a loss. Thus, if the insured property experiences a loss and the policyholder sells the property together with the contract of property insurance, the purchaser would have an insurable interest that would not preclude the enforcement of the contract of insurance.

**Public Adjusters**

Background on Public Adjusters

Public adjusters are required to be qualified and licensed by the Department of Financial Services (DFS). A public adjuster is a person "who, for money, commission, or any other thing of value, prepares, completes, or files an insurance claim form for an insured or third-party claimant or who, for money, commission, or any other thing of value, acts on behalf of, or aids an insured or third-party claimant in negotiating for or effecting the settlement of a claim or claims for loss or damage covered by an insurance contract or who advertises for employment as an adjuster of such claims."[19]

There are currently other limitations and regulations regarding public adjusting. For example, a licensed contractor or subcontractor may not adjust a claim on behalf of an insured unless licensed and compliant as a public adjuster under chapter 626, F.S.[20] However, the contractor may discuss or explain a bid for construction or repair of covered property with the residential property owner who has suffered a loss or damage covered by a property insurance policy, or the insurer of such property, if the

[13] s. 627.405(1), F.S.
[14] s. 627.405(2), F.S.
[15] s. 627.405(3), F.S.
[16] Peninsular Fire Ins. Co. v. Fowler, 166 So. 2d 206 (Fla. 2d DCA 1964).
[17] See s. 627.405, F.S.
[18] This has been brought up in briefing in three cases currently up on appeal to the Florida Fourth District Court of Appeal. See 'Drafting Issues or Other Comments' for further discussion.
[19] s. 626.854(1), F.S.
[20] s. 626.854(16), F.S.

contractor is doing so for the usual and customary fees applicable to the work to be performed as stated in the contract between the contractor and the insured.[21]

Current law also contains a public adjuster conflict of interest section that prohibits public adjusters from participating, directly or indirectly, in the reconstruction, repair, or remediation of the insured property that is the subject of the claim or engaging in any other activity that could reasonably be construed as a conflict of interest.[22]

Some trial courts in Florida have dismissed cases brought by a vendor through a purported AOB, reasoning that the vendor was in engaging in unlawful or unlicensed public adjusting. For example, in Emergency Services 24, Inc. v. American Traditions Ins. Co., the court dismissed a claim brought pursuant to a purported AOB, finding that the assignment was unauthorized under Florida law because it "holds Plaintiff out as a 'public adjuster' as defined in Florida Statute 626.854."[23] Further, in NextGen Restoration, Inc. v. Homeowners Choice Prop. & Cas. Ins. Co., the court conceded that "the right to receive post-loss insurance proceeds is assignable," but suggested that there is a lack of case law permitting the "assignment of a prospective insurance recovery whose amount has not yet been determined."[24] The court went on to state that "[e]stablishing that amount, fixing it as a sum certain, is the essence of 'adjusting' an insurance claim."[25] As such, the court dismissed the plaintiff's claim, holding that the claim, as pled, "fits the statutory definition of public adjusting . . . as defined in Section 626.854, Florida Statutes – which proscribes such conduct by contractors."[26] However, other trial courts in Florida have come out differently on this issue. For example, in Start to Finish Restoration, LLC v. Homeowners Choice Prop. & Cas. Ins. Co, the court denied the insurer's motion to dismiss, finding that the vendor did not hold itself out to be a public adjuster in contravention of statute because the allegations "simply indicate[d] Plaintiff permissibly received the assignment of rights to receive payments due and [was] acting solely for its own benefit."[27]

Effect of the Bill on Public Adjusters

This bill clarifies that any assignment or agreement purporting to transfer the authority to adjust, negotiate, or settle any portion of a claim to a contractor or subcontractor, or that is otherwise in derogation of the public adjuster contractor prohibition section is void. The bill appears to have the effect of prohibiting a vendor from disputing the amount of payment with the insurer under an AOB. Thus, if a property insurance policy permitted a post-loss AOB, the assignment would be limited to payment of a fixed amount to the vendor.

## Insurer's Duties and Timeframes with respect to Property Insurance Claims

Background on Insurer's Duties and Timeframes with respect to Property Insurance Claims

Current law prescribes various timeframes that insurers are required to comply with regarding property insurance claims. Current law provides that when an insurer receives initial communication with respect to a claim, the insurer must review and acknowledge receipt of the communication within 14 calendar days, unless payment is made within that period of time or unless the failure to acknowledge is caused

[21] Id.
[22] "A public adjuster may not participate, directly or indirectly, in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the licensee; may not engage in any other activities that may be reasonably construed as a conflict of interest, including soliciting or accepting any remuneration from, of any kind or nature, directly or indirectly; and may not have a financial interest in any salvage, repair, or any other business entity that obtains business in connection with any claim that the public adjuster has a contract or an agreement to adjust." s. 626.8795, F.S.
[23] Emergency Services 24, Inc. v. American Traditions Ins. Co., No 12-CC-26928 (Fla. Hillsborough Cty. Ct. April 30, 2013).
[24] NextGen Restoration, Inc. v. Homeowners Choice Prop. & Cas. Ins. Co., No 12-012813-CI-19 (Fla. Pinellas Cty. Ct. July 17, 2013).
[25] Id.
[26] Id.
[27] Start to Finish Restoration, LLC v. Homeowners Choice Prop. & Cas. Ins. Co., No. 2012-CA-6605 (Fla. Manatee Cty. Ct. May 23, 2013).

by factors beyond the control of the insurer which reasonably prevent such acknowledgment.[28] If the acknowledgment is not in writing, a notification indicating acknowledgment must be made in the insurer's claim file and dated.[29] The acknowledgement must be responsive to the communication.[30] If the communication is a notification of a claim, the acknowledgment must provide necessary claim forms and instructions, including an appropriate telephone number, unless the acknowledgment reasonably advises the claimant that the claim appears not to be covered by the insurer.[31]

Unless otherwise provided by the policy or law, the insurer must begin such investigation as is reasonably necessary within 10 working days after receiving proof of loss statements, unless the failure to begin the investigation is caused by factors beyond the control of the insurer which reasonably prevent the commencement of such investigation.[32]

Current law codifies a Homeowner Claims Bill of Rights, describing some of the rights held by insurance policyholders.[33] The insurer is required to provide the policyholder with a copy of the Homeowner Claims Bill of Rights within 14 days of a claim; however the bill of rights does not create a new civil cause of action.[34] Among other things, the Homeowner Claims Bill of Rights states that upon written request, within 30 days after submitting a complete proof-of-loss statement to the insurer, the policyholder has the right to receive confirmation that his or her claim is covered in full, partially covered, or denied, or receive a written statement that his or her claim is being investigated.[35]

Further, Florida currently provides that a residential property insurer must pay or deny the property insurance claim or a portion of the claim within 90 days after receiving notice of the claim from the policyholder, unless the failure to pay is caused by factors beyond the control of the insurer which reasonably prevent such payment.[36]

Currently, there are protections in place for situations in which an insurer would be unable to meet such timeframes due to situations outside of their control, such as when there is a hurricane. As demonstrated above, most of the provisions excuse an insurer from fulfilling its obligation within the prescribed timeframe when the failure to do so is "caused by factors beyond the control of the insurer which reasonably prevent" strict compliance. Further, current law bestows certain powers to the Commissioner of Insurance (the "Commissioner") and the Governor in the case of a declared emergency:

- When the Governor declares a state of emergency, s. 252.63, F.S., provides the Commissioner with the authority to issue general orders applicable to all Florida insurance companies, entities, and persons[37]
- When the Governor declares a state of emergency, s. 252.36(5)(a), F.S., provides the Governor with the authority to suspend the provisions of any regulatory statute prescribing procedures for conduct of state business or the orders or rules of any state agency, if strict compliance with the provisions of any such statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency.

Effect of the Bill on Insurer's Duties and Timeframes with respect to Property Insurance Claims

This bill shortens some of the timeframes that insurers must comply with regarding property insurance claims. This bill may have the effect of requiring some insurers to alter some of their claims practices in

[28] s. 627.70131(1)(a), F.S.
[29] Id.
[30] s. 627.70131(2), F.S.
[31] Id.
[32] s. 627.70131(3), F.S.
[33] s. 627.7142, F.S.
[34] Id.
[35] Id.
[36] s. 627.70131(5)(a), F.S.
[37] Such orders remain in effect for 120 day unless terminated sooner by the Commissioner, and can be extended for an additional 120 days. By concurrent resolution, the Legislature may terminate any order issued by the Commissioner under this section. s. 252.63(2), F.S.

order to meet the new statutory timeframes. Below is a table illustrating the various changes the bill provides to the statutory timeframes:

| | Current Timeframe | Timeframe Changed by Bill |
|---|---|---|
| Upon receiving communication with respect to a claim, insurer must review and acknowledge receipt of communication within: | 14 calendar days | 7 calendar days |
| Upon receiving communication with respect to a claim, insurer must provide policyholder with Homeowner Claims Bill of Rights within: | 14 days | 7 days |
| Upon receiving proof of loss statements, insurer must begin such investigation as is reasonably necessary within: | 10 days | Unchanged (10 days) |
| After insurer receives proof of loss, upon written request, insurer must provide policyholder with confirmation that claim is covered in full, partially covered, or denied, or provide written statement that the claim is being investigated, within: | 30 days | 15 days |
| Upon initial notice of claim, insurer must pay or deny such claim or part of such claim within: | 90 days | 45 days |

The bill also requires a residential property insurer to respond within 7 days of receiving a communication in writing from a third party identified in s. 627.422(2)(a) – (c) with respect to the claim requesting the insurer acknowledge the existence of a policy of insurance on the property.

The bill does not change the statutory safeguards in place for exigent circumstances in which an insurer would be unable to meet the timeframe, such as a hurricane. The bill does not change the language in the statutes excusing the insurer from strict compliance with the timeframe when the failure to do so "is caused by factors beyond the control of the insurer which reasonably prevent" the insurer from performing such duties. Further, the powers bestowed upon the Commissioner and the Governor during a state of emergency would remain in place.

B. SECTION DIRECTORY:

**Section 1.** Amends s. 626.854, F.S., relating to public adjusters.

**Section 2.** Amends s. 627.405, F.S., relating to insurable interest; property.

**Section 3.** Amends s. 627.422, F.S., relating to assignment of policies.

**Section 4.** Amends s. 627.70131, F.S., relating to insurer's duty to acknowledge communications regarding claims; investigations.

**Section 5.** Amends s. 627.7142, F.S., relating to Homeowner Claims Bill of Rights.

**Section 6.** Provides an effective date of July 1, 2015.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. The bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

There are currently three cases on appeal to the Florida Fourth District Court of Appeal. As of the date of this analysis, the three cases are all set for oral argument on March 24, 2015.

These cases and corresponding issues on appeal are as follows:

- ASAP Restoration and Constr., Inc. v. Tower Hill Signature Ins. Co., Case No. 4D13-4174
  - Issue: Whether the trial court erred as a matter of law in dismissing the vendor's complaint on the basis that the AOB was invalid under the anti-assignment and loss payment clauses of the policy?
- One Call Prop. Services, Inc. v. Security First Ins. Co., Case No. 4D14-0424
  - Issue: Whether the trial court erred as a matter of law in dismissing the vendor's complaint on the basis that the AOB was invalid under the anti-assignment and loss payment clauses of the policy?
- Emergency Services 24, Inc. v. United Prop. & Cas. Ins. Co., Case No. 4D14-0576
  - Issue: Whether the trial court erred in entering summary judgment in favor of the insurer on the basis that the vendor's AOB was invalid?

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 18, 2015, the Insurance & Banking Subcommittee considered a proposed committee substitute and reported the bill favorable with a committee substitute. The proposed committee substitute did the following:

- Removed the limitation on attorney's fees contained in the original bill;
- Clarified that a property insurance policy may prohibit the assignment of post-loss benefits except in certain limited circumstances;

- Clarified that insurable interest does not survive assignment, except when assigned to a subsequent purchaser of covered property;
- Clarified that any assignment or agreement that purports to assign to a contractor or subcontractor the authority to adjust, negotiate, or settle any portion of a claim is void;
- Shortened the timeframes associated with property insurance claims, requiring insurers to fulfill certain duties related to property insurance claims quicker.

The staff analysis has been updated to reflect the committee substitute as passed by the Insurance & Banking Subcommittee.